U.S. Department of Justice



Office of the Inspector General

June 14, 2005

The Honorable John Conyers, Jr. U.S. House of Representatives Washington, DC 20515

Dear Congressman Conyers:

Enclosed is a copy of the Office of the Inspector General (OIG) report entitled, A Review of the Declassification Process for a 9/11 Commission Staff Monograph. The OIG investigated this matter in response to your letter dated February 15, 2005. In that letter, you requested that we investigate the role of the Department of Justice in the declassification of the staff monograph, and specifically whether "political motives may have influenced the Bush Administration's decision to declassify [the FAA Monograph] only . . . after the presidential election and after the confirmations of Secretary of State Condoleezza Rice and Attorney General Alberto Gonzales."

You also sent a similar letter to the Inspector General of the Department of Transportation (DOT) asking him to investigate the involvement of the DOT in the declassification decision. We coordinated with that office in conducting our review.

If you have any questions about the enclosed report, please contact me or Gail Robinson, the OIG's Acting General Counsel, at (202) 616-0644.

Sincerely,

Glenn A. Fine Inspector General

Enclosure

cc: Kenneth Mead Inspector General Department of Transportation



A Review of the Declassification Process for a 9/11 Commission Staff Monograph

I. Introduction

At the end of January 2005, Daniel Levin, the former Acting Assistant Attorney General for the Office of Legal Counsel in the Department of Justice (DOJ), delivered to the National Archives and Records Administration (NARA) both a full and a redacted version of a monograph authored by the staff of the National Commission on Terrorist Acts Upon the United States (the 9/11 Commission). Levin had received the monograph on August 21, 2004, the last day of the 9/11 Commission's existence, from the Commission's General Counsel. The monograph consisted of two parts: Part I, entitled "We Have Some Planes:" The Four Flights – A Chronology; and Part II, entitled Civil Aviation Security and the 9/11 Attacks.¹

The redacted version of the FAA Monograph had been produced as a result of a review process coordinated by Levin and involving numerous federal agencies, including the DOJ. During this review, the agencies identified material in the FAA Monograph that was either classified or otherwise sensitive and therefore should not be made available to the public. A declassified version of the document was then created by blacking out this material from

¹ In this report, we refer to the document as the FAA Monograph.

the document. Shortly after receiving the declassified version of the FAA Monograph from Levin, the NARA made it available to the public on its website.²

In a letter dated February 15, 2005, addressed to the Inspectors General of the Department of Justice and Department of Transportation,
Representatives John Conyers, James Oberstar, and Henry Waxman raised questions about the length of time it took to deliver the FAA Monograph to the NARA. Specifically, they stated that "political motives may have influenced the Bush Administration's decision to declassify [the FAA Monograph] only . . . after the presidential election and after the confirmations of Secretary of State Condoleezza Rice and Attorney General Alberto Gonzales." The congressmen requested that each Office of the Inspector General investigate its respective department's role in the declassification of the FAA Monograph.

In response to the Congressmen's letter, the DOJ Office of the Inspector General (OIG) reviewed the circumstances surrounding the declassification process and the role played in it by DOJ personnel. We reviewed the extensive electronic mail (e-mail) messages maintained by former Acting Assistant Attorney General Levin relating to the declassification process and interviewed Levin.

We determined that the primary reason for the approximately five-month delay between the time Levin received the full FAA Monograph from the 9/11

² The redacted monograph can be found at http://www.archives.gov/research_room/research_topics/staff_report_3.pdf.

Commission's General Counsel and delivery of the declassified version to the NARA was the length of time it took the Transportation Security Administration (TSA) to complete its review of the Monograph. Also contributing to the delay was the attempt by Levin and the White House Counsel's Office to minimize the amount of material that was redacted from the public version of the document. We found no indication in the records we reviewed of any purposeful attempt to delay the declassification process. Indeed, it appears that Levin and the White House Counsel's Office repeatedly pressed the TSA to complete its review.

II. The Origins of the FAA Monograph

In late 2002, Congress passed and the President signed legislation creating the 9/11 Commission. The Commission was charged with conducting a comprehensive investigation into the circumstances and causes of the terrorist attacks of September 11, 2001. The legislation provided that the Commission would expire thirty days after its final report was delivered to the President and Congress. The Commission delivered that report on July 22, 2004, and therefore expired on August 21, 2004.

In addition to the final report, the 9/11 Commission staff produced three other written documents. Two of these were staff monographs that were released to the public on August 21, 2004.³ The other was the FAA

³ Both of these reports are also available on the NARA web site at http://www.9-11commission.gov/staff_statements/index.htm#monographs.

Monograph, which, as noted above, was not made available to the public until February 2005.

Prior to their public release, all of the documents produced by the 9/11 Commission and its staff were submitted to a review process intended to scrub them of classified or otherwise sensitive information not appropriate for public release. As discussed below, Levin acted as the coordinator of this review process for all federal agencies except the White House.

III. Levin's Role in the Review Process

Levin told the OIG that he became the coordinator for the federal agencies' review of 9/11 Commission documents at the request of then Attorney General Ashcroft and then White House Counsel Alberto Gonzales. At the time he undertook the coordinator role, Levin was serving as Counselor to the Assistant Attorney General for the Criminal Division. He thereafter became Counselor to Attorney General Ashcroft, and in July 2004, the Acting Assistant Attorney General for the Office of Legal Counsel (OLC). He continued to serve in the coordinator role for 9/11 Commission documents throughout this period. Levin left the DOJ in February 2005. He is now serving as Senior Associate Counsel to the President and Legal Advisor to the National Security Council.

Levin explained that in the coordinator role, he determined which agencies would be asked to review 9/11 Commission documents, distributed the documents to those agencies, received their comments, and worked with

agency and Commission staff to produce versions of the documents that could be publicly released. Levin said that his duties did not encompass review by White House components, which was instead handled by the White House Counsel's Office.

Levin told the OIG that prior to release of the FAA Monograph, all the documents that had been subjected to the review process, including the Commission's lengthy report and the other two staff monographs, were released to the public in "clean" form – that is, without any material visibly redacted from them. Levin said that to accomplish this, he and various agency personnel worked with the Commission staff to rephrase or remove certain material so the documents would not contain classified or sensitive material.

IV. The FAA Monograph

In August 2004, while the Commission was still operating, Commission staff provided Levin with a copy of the FAA Monograph and requested that he circulate it to the appropriate federal agencies for review and eventual public release. Levin told the OIG that because of the length and contents of the document, and because the agencies were already in the process of reviewing two other staff monographs, he told the Commission staff that he did not believe they could complete a review of the entire document prior to the Commission's expiration on August 21. Consequently, Levin said that he suggested that he circulate only Part I of the monograph to the agencies.

Accordingly, on August 10, 2004, Levin sent an e-mail to 18 individuals from seven different agencies, informing them of the existence of Part I and requesting that the agencies review it for classified and otherwise sensitive information. Levin asked the agency representatives to provide him with the results of their reviews by August 17. According to Levin's e-mail records, by August 19, all the agencies had completed their reviews of Part I, as well as of the other two staff monographs, and their comments had been communicated to the 9/11 Commission. As noted above, public versions of the other two monographs were released on August 21. Levin told the OIG that Part I was not also released at that time because the Commission staff had decided that it wanted to release the two parts of the monograph simultaneously.

On August 23, Levin sent an e-mail addressed to an individual in the White House Counsel's Office, an individual at the National Security Council, and an attorney in the OLC. In this e-mail, Levin stated that on the evening of Saturday August 21, the 9/11 Commission's General Counsel had delivered to him a document consisting of "the previously submitted four flights monograph [Part I] with part II added back." Levin further stated that that the General Counsel had requested that the document be reviewed and cleared for public release and had provided him with a computer disk containing the document "presumably so we can make any changes required to declassify." Levin

⁴ The agencies were: the Department of Homeland Security, including the Transportation Security Administration; the Federal Aviation Administration; the National Security Council, the Department of Defense; the Central Intelligence Agency; the Department of State; and the Department of Justice, including the Federal Bureau of Investigation.

concluded by stating that "[o]bviously this request raises a number of questions" and suggested they discuss how to proceed.

Levin told the OIG that the General Counsel's request raised questions in his mind because, given the 9/11 Commission's expiration, he was unsure whether the former Commission staff had authority to make any changes to the document that might be necessary to purge it of classified or sensitive information. Levin said he consulted with the OLC counsel about this issue, and that both he and the counsel were of the view that the former Commission staff was without authority to alter the document. Levin said he conveyed this view to the White House Counsel's Office, and together they determined that the best course was to proceed with agency review of the document and decide how to handle the request for public release once they learned the extent of the redactions the agencies believed would be required. In terms of the timing of the review, the Counsel's Office told Levin to "please set whatever internal deadlines you believe are reasonable."

Accordingly, on September 1, 2004 – ten days after receiving the document from the Commission's General Counsel – Levin circulated to the same agencies to whom he had sent Part I several weeks earlier the full FAA Monograph. Levin told the OIG that he had to circulate the entire document, rather than just Part II, because Part I had been changed since the agencies' earlier review of it. In an e-mail to the agencies, Levin requested they inform him "what portions [of the document] would need to be redacted to make the document unclassified and also what the classification level would be if the

material remained in." He also told them that because there was no one with authority to negotiate changes to the document, the ultimate choices were either classification or redaction of classified material. Finally, he requested that they provide him with the results of their reviews by Friday, September 17.

On September 15, Levin sent an e-mail to the agencies reminding them of the September 17 deadline and requesting that they let him know if they believed they would not be able to meet it. In response, the TSA representative requested an extension until the following Wednesday, September 22. In an e-mail to all the agency representatives the next day, Levin acceded to TSA's extension request and asked that all agencies who had not yet responded provide him with the results of their reviews as soon as possible, but no later than September 22.

All of the agencies except TSA met the September 22 deadline. On Sunday, September 26, Levin e-mailed the TSA representative, inquiring about the status of the agency's review. The TSA representative responded by stating that he hoped to have the agency's comments to Levin by that Monday, September 27.

The TSA did not provide the comments the next day. In fact, over the next several weeks, Levin contacted the TSA representative by e-mail three more times to inquire about the status of the TSA review: on October 4, October 13, and October 18. In the last of these e-mails, he wrote: "I probably need to get the White House to weigh in on this if I don't get the remaining

comments today or tomorrow " In response, the TSA representative said he would "press" the issue.

On Tuesday, October 19, TSA provided its proposed redactions to Levin. In an e-mail to the White House Counsel's Office dated that day, Levin described the redactions as "extensive." Levin told the OIG that he promptly incorporated TSA's proposed redactions into a draft of the document in which he had already entered the redactions suggested by the other agencies. He said that the majority of the redactions in this document were made at the behest of the TSA. According to Levin's e-mail records, he forwarded this document to the White House Counsel's Office on October 26.

Levin told the OIG that both he and his contacts in the White House Counsel's Office were concerned about the amount of material the agencies, and in particular the TSA, had requested be redacted from the public version of the FAA Monograph. Levin said that as a result of this concern, the White House Counsel's Office requested that knowledgeable individuals within the National Security Council review the document to determine whether they agreed that all the agencies' proposed redactions were necessary.

On November 17, the White House Counsel's Office informed Levin that this review had been completed. The Counsel's Office told Levin that although the White House agreed with some of the proposed redactions, it also questioned the need for others. The Counsel's Office provided Levin with a copy of the FAA Monograph indicating the areas of disagreement and asked him to work with the appropriate agencies and departments to "minimize to the

extent possible, the number of sections that need to remain classified." In an e-mail dated Wednesday, November 24, Levin replied that he concurred with the White House's assessment and would ask TSA – the agency responsible for the majority of the redactions – to reconsider its redaction requests.

We were not able to pinpoint the exact date that Levin contacted the TSA regarding reconsideration, but it was sometime prior to December 10. On that day, Levin e-mailed the TSA representative requesting an "ETA [estimated time of arrival] on your review of the classification issues." In reply, the TSA representative told Levin he hoped to get back to him in "mid-January."

On Wednesday, December 29, Levin again e-mailed the TSA representative to press for completion of the TSA review. He wrote: "In anticipation of Judge Gonzales' hearing next week, I was asked if I could get a firm ETA for the monograph" In reply the TSA representative told Levin TSA would complete its review by January 14.

The TSA did not meet its proposed January 14 deadline. On January 21, the White House Counsel's Office e-mailed Levin to inquire about the status of the TSA review. In this e-mail the Counsel's Office representative wrote, "although this is not a big issue in the grand scheme of things, I'd like to minimize the Judge's list of 'unfinished business' to the greatest extent possible." Levin replied that he would "nag" TSA for a response.

Levin finally received the results of TSA's second review of the FAA

Monograph on January 26, 2005. Although TSA agreed to the release of some
of the material it had previously sought to redact, according to Levin's e-mail

records, the redacted material remained "substantial." Levin told the OIG that he determined that there was little use in pressing for further reductions in the amount of material to be redacted and that he therefore prepared a document that day which reflected the TSA's proposals. According to Levin's e-mail records, he immediately notified the NARA of the document's availability. The records further reflect that the NARA picked up the document from Levin on Friday, January 28. NARA posted the document on its internet website shortly thereafter.

V. Conclusion

The OIG's review revealed more than three months of the approximately five-month period that passed between delivery of the FAA Monograph to Levin by the Commission's General Counsel and delivery of the declassified version of the document by Levin to the NARA was consumed by TSA reviews. The first of these reviews took more than one month – from September 1 until October 19 — to complete. And, when, in an attempt to minimize the amount of material that would not be made available to the public, Levin and the White House Counsel's Office asked TSA to reconsider some of its initial redaction requests, it took the agency nearly two months to complete that review. The remainder of the five months was attributable to time spent determining how to handle the request that the document be made public in light of the 9/11 Commission's expiration, time needed by Levin to incorporate the redactions proposed by the various agencies that reviewed the document, and an

approximately three-week period in which the White House considered the agencies' redaction requests.

There was no indication in the material available to the OIG that there was any purposeful attempt to delay the release of the declassified version of the FAA Monograph. Rather, it appears that both Levin and the White House Counsel's Office repeatedly pressed the TSA to complete its review, but that the TSA nevertheless took many weeks to do so.



To: Shirley Miller/AWA/FAA@FAA

CC

Subject: RE: Classification Comments

Got them. Thanks very much.

----Original Message----

From: shirley.miller@faa.gov [mailto:shirley.miller@faa.gov]

Sent: Thursday, September 16, 2004 5:29 PM

To: Levin, Dan

Subject: Re: Classification Comments

We are faxing...only the pages where we have concerns though. Shirley

"Dan.Levin@usdoj. gov" <Dan.Levin 09/16/2004 04:28 PM

To: Shirley Miller/AWA/FAA@FAA

| cc:
| Subject: Classification Comments

Please fax

secure: 202-514-9207 unclass: 202-514-0539

Thanks very much



"Dan.Levin@usdoj.gov " <Dan.Levin

09/15/2004 06:24 AM

To: "Faith.Burton@usdoj.gov" <Faith.Burton@usdoj.gov>, "Patrick.Hughes@dhs.gov" <Patrick.Hughes@dhs.gov>, "'HofmannKW@state.gov" <HofmannKW@state.gov>, "Paul.Irving@usss.dhs.gov" <Paul.Irving@usss.dhs.gov>, "stephen.cambone@osd.mil" <stephen.cambone@osd.mil>, "john.pistole@ic.fbi.gov" <john.pistole@ic.fbi.gov>, "MDMurphy@whmo.mil" <MDMurphy@whmo.mil>, "jolenml@ucia.gov" <jolenml@ucia.gov>, "Paul.Montgomery@osd.mil" <Paul.Montgomery@osd.mil>, "Mary.Deluca@usss.dhs.gov" <Mary.Deluca@usss.dhs.gov>, ""pobrien3@leo.gov" <pobrien3@leo.gov>, ""kmvalen@nsa.gov" <kmvalen@nsa.gov>, "John.Kurtz@osd.mil" <John.Kurtz@osd.mil>, ""jehner@nsa.gov" "Pat.Downs@osd.mil" <Pat.Downs@osd.mil>, "jlehner@nsa.gov" <jlehner@nsa.gov>, "mincontr@leo.gov" <mincontr@leo.gov>,
"Tom.McGivern@do.treas.gov" <Tom.McGivern@do.treas.gov>,
Shirley Miller/AWA/FAA@FAA, "rmkelly@fbi.gov" <rmkelly@fbi.gov>, "Faith.Corson.ctr@osd.mil" <Faith.Corson.ctr@osd.mil>, "'Hilary.Fischer.ctr@osd.mil" <Hilary.Fischer.ctr@osd.mil>, "'jennigl@ucia.gov" <jennigl@ucia.gov>, "borekjs@state.gov" <borekjs@state.gov>, "'Daniel.Brown@dhs.gov" <Daniel.Brown@dhs.gov>, "Brandon.Straus@dhs.gov" <Brandon.Straus@dhs.gov>, "'Thomas_A._Monheim@who.eop.gov" <Thomas_A._Monheim@who.eop.gov>, "john_b._bellinger@nsc.eop.gov" <john_b._bellinger@nsc.eop.gov>, "John_M._Mitnick@who.eop.gov" <John_M._Mitnick@who.eop.gov>, "Edward_McNally@who.eop.gov" <Edward_McNally@who.eop.gov> cc: "Dan.Levin@usdoj.gov" <Dan.Levin@usdoj.gov>

Subject: RE: CIVIL AVIATION STAFF MONOGRAPH

We are hoping to collect all classification comments on this monograph by this Friday. For those agencies who have not yet submitted comments please do so by Friday if at all possible. If you expect to have comments but won't be able to get them in Friday please let me know when you expect to have them completed.

Thanks very much.

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----Original Message----
From: Levin, Dan
Sent: Wednesday, September 01, 2004 11:08 AM
To: 'Patrick.Hughes@dhs.gov'; Burton, Faith; 'HofmannKW@state.gov';
'Paul.Irving@usss.dhs.gov'; 'stephen.cambone@osd.mil'; 'john.pistole@ic.fbi.gov'; 'MDMurphy@whmo.mil'; 'jolenml@ucia.gov';
'Paul.Montgomery@osd.mil'; 'Mary.Deluca@usss.dhs.gov';
'pobrien3@leo.gov'; 'kmvalen@nsa.gov'; 'John.Kurtz@osd.mil'; 'Pat.Downs@osd.mil'; 'jlehner@nsa.gov'; 'mincontr@leo.gov';
'Tom.McGivern@do.treas.gov'; 'shirley.miller@faa.gov';
'rmkelly@fbi.gov'; 'Faith.Corson.ctr@osd.mil';
'Hilary.Fischer.ctr@osd.mil'; 'jennigl@ucia.gov'; 'borekjs@state.gov';
'Daniel.Brown@dhs.gov'; 'Brandon.Straus@dhs.gov';
'Thomas_A._Monheim@who.eop.gov'; 'john_b._bellinger@nsc.eop.gov'
Cc: Levin, Dan
Subject: CIVIL AVIATION STAFF MONOGRAPH
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There is one final 9-11 Commission staff monograph - on the four flights and civil aviation security. It is in two parts and is a total of 120 pages, including endnotes. The first part (approx. 52 pages and 18 pages of endnotes) is on the four flights and it is similar to what was previously circulated with some additional material added (they advised that they have

marked all of the new material in part one with lines in the margin). The second part is on civil aviation security (approx. 31 pages and 19 pages of endnotes).

The monograph was delivered to us on the evening of August 21 and it has taken us some time to figure out what we could legally do with it since the commission is no longer in existence. This is what we have determined:

- 1. I will circulate for pre-publication review by WASHFAX (it will probably be circulated in two pieces-each part with its accompanying endnotes). If you identify classified material please both let me know what portions would need to be redacted to make the document unclassified and also what the classification level would be if the material remained in. There is no one we can negotiate changes or substitutions with, so our alternatives are redacting the material or classifying the document. We will decide on our course of action once we see how extensive any classified material is.
- 2. As far as substantive comments are concerned, because there is no one to negotiate changes with we cannot suggest or make any substantive changes. It is probably worth identifying any such comments however for possible use if the monograph is publicly released.

CIRCULATION:

FAA: Shirley Miller CIA: Jolene Lowry FBI: Pat O'Brien DOD: Pat Downs STATE: Karl Hofmann TSA: Brandon Straus DHS: Patrick Hughes DOJ: Faith Burton NSC: John Bellinger

Please try to get me any comments by Friday, September 17 if at all possible. Thanks very much.



Shirley Miller 08/12/2004 05:01 PM To: dan.levin@usdoj.gov cc: Lindy.Knapp@ost.dot.gov Subject: Staff Monograph

Dan,

FAA has no classification issues with the Four Planes Staff Monograph. But we do have some suggested

Thanks.



911stfmono.doc

THE WHITE HOUSE WASHINGTON March 1, 2005

The Honorable Thomas H. Kean The Honorable Lee H. Hamilton 9/11 Public Discourse Project One Dupont Circle, N.W., Suite 700 Washington, D.C. 20036

Dear Governor Kean and Mr. Hamilton:

Thank you for your February 11 letter regarding the 9/11 Commission staff monograph, "The Four Flights and Civil Aviation Security" ("monograph"). This letter responds to the issue you raise.

My understanding is that the then-General Counsel of the Commission submitted to the Department of Justice ("DOJ") this 120-page monograph on the last day of the Commission's existence (August 21, 2004). I also understand the Commission had in its possession the information underlying the monograph when the Commission drafted its final report, and presumably included in that report the key information it wished to make public. Because this monograph was not submitted by the July 26, 2004 deadline and was not "agreed to by a majority of Commissioners," it does not fit within the legal requirements imposed by Congress for Commission reports. However, as an accommodation to the Commission, DOJ spearheaded a pre-publication review of the monograph to determine whether it could be publicly released consistent with the constitutional and statutory obligation to protect classified and other sensitive national security information. I am advised this exercise resulted in certain reductions to protect detailed descriptions of aviation security measures from disclosure to those who might attempt attacks on aircraft in America in the future.

As you note, throughout the Commission's existence, because of the cooperative relationship between the Executive Branch and the Commission, all Commission reports, staff monographs, and staff statements were released without redaction. As you are aware, this was often accomplished by agreeing to certain textual changes in the Commission's drafts. However, because the Commission ceased to exist hours after this monograph was submitted, DOJ concluded that — unlike with prior Commission reports — no legal representative of the former Commission was properly empowered to revise the monograph or negotiate with DOJ on the Commission's behalf regarding classification issues.

I am pleased that the White House Counsel's Office and General Gonzales were able to work with you and the Commission cooperatively, and I look forward to continuing those good relationships with you. I have asked for further review of your request as to whether the monograph can be released responsibly without reductions.

Horrict Miers

Counsel to the President

9/11

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Christopher A. Kojm President February 11, 2005

The Honorable Harriet Miers Counsel to the President The White House Washington, DC 20500

Dear Ms. Miers,

We write with respect to the Administration's classification review of the 9/11 Commission's staff report, "The Four Flights and Civil Aviation Security."

At the expiration of the life of the Commission last August, we had requested the expeditious completion of a classification review of this document.

During the life of the Commission, we had developed an excellent relationship with Judge Gonzales that led to the successful classification review of 17 staff statements, two staff reports and the final report of the Commission. This process involved the review of highly classified, compartmented materials. Through the hard work of the White House Counsel's office, Dan Levin, and others in the Executive branch, the final report of the Commission was completed and submitted to the public without a single redaction. This was a significant accomplishment for the American people, allowing the story of 9/11 to be told in full.

We were disappointed, therefore, that a classification review of this last staff report could not be completed without reductions. This came as a surprise to us, as nearly all of material included in this staff report was of a lower level of sensitivity than material that had previously been placed in the public record.

We respectfully request that another effort be made to release this staff report without redactions. Several members of the former Commission staff retain security clearances and would be willing to cooperate in any way with you and your office to achieve this desirable outcome.

Finally, we wish you every success in your new and important assignment in service to our nation.

With best regards,

Tom Kean

Lee Hamilton

H/Cen